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No. 89-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEWAYNE HULSEY,

Petitioner,

v.

WILLIS SARGENT, Warden of the Cummins Unit, Arkansas Department of Correction,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a statutory presumption of correctness apply to a state trial court's finding of juror bias, where it is conceded by all parties and the Eighth Circuit Court of Appeals that the state trial court applied a since-discredited standard of law?

2. Must the state court record in a death penalty case establish that a juror is unable to disregard her scruples against the death penalty before she may be excused for cause?

3. Did *Wainwright v. Witt* or *Adams v. Texas* alter the legal standard for determining juror bias in death penalty cases and/or the degree of deference to be given to state trial court findings of fact, and if so did it do so retroactively?

PARTIES INVOLVED

All parties to this proceeding are named in the caption of this case. Mr. Hulsey is presently incarcerated in Tucker, Arkansas. G. David Guntharp is the warden of that facility.

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v.

WILLIS SARGENT, Warden of the Cummins Unit, Arkansas Department of Correction,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Dewayne Hulsey prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on March 13, 1989.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, dated January 19, 1989, is reported at 865 F.2d 954 and is reproduced in Appendix A, *infra*, pp. 1a-13a. Rehearing and rehearing en banc were denied on March 13, 1989; those orders are reproduced in Appendices B and C, *infra*, pp. 14a-16a. The Order of the United States District Court for the Eastern District of Arkansas, dated December 29, 1987, is unreported and is reproduced in Appendix D, *infra*, pp. 17a-22a. The opinion and remand order of the Eighth Circuit Court of Appeals, dated June 12, 1987, is

reported at 821 F.2d 469 and is reproduced in Appendix E, *infra*, pp. 23a-29a. The Excerpted Findings of the District Court, dated June 26, 1981, are not reported and are reproduced in Appendix F, *infra*, pp. 30a-43a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1989, on which date that court denied petitioner's petition for rehearing and suggestion for rehearing en banc.[1] On May 30, 1989, this Court granted petitioner's motion for an extension of time until July 12, 1989, in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The questions presented—challenging the constitutionality of the jury composition at petitioner's trial—were fully and properly raised in the original petition for writ of habeas corpus and on appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

[1] The Eighth Circuit granted the petition for rehearing to the extent that it corrected its first order directing the imposition of the wrong remedy. *See* App. B at 14a-15a.

The statutory provision involved is 28 U.S.C. § 2254(d), which is set forth in its entirety in Appendix G, *infra*, pp. 44a-45a.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises out of two decisions of the United States District Court for the Eastern District of Arkansas, in 1981 and again in 1987, to vacate petitioner's death sentence on the ground that prospective juror Mary Creamer was improperly excused for cause because of her views on the death penalty.[2] In both decisions, the district court based its ruling on two grounds: first, under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), that Juror Creamer's voir dire testimony did not establish with unmistakable clarity that she would automatically vote against the imposition of the death penalty without regard to any evidence developed at trial (App. D at 21a; App. F at 33a-34a); and second, under *Adams v. Texas*, 448 U.S. 38 (1980), that her testimony failed to establish that her views on the death penalty would prevent or substantially impair the performance of her duties in accordance with the court's instructions and her oath. (App. D at 21a; App. F at 38a-39a, 41a). The Eighth Circuit has never addressed the substantive merits of either holding.

Respondent appealed Judge Eisele's 1981 decision to the Eighth Circuit. On June 12, 1987, the Eighth Circuit reversed the district court and remanded the case for reconsideration in light of this Court's de-

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[2] The district court had jurisdiction to entertain petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 28 U.S.C. § 1331.

cision in *Wainwright v. Witt*, 469 U.S. 412 (1985), which held that determinations of juror bias relating to the person's views on the death penalty are subject to the statutory presumption of correctness under 28 U.S.C. § 2254(d). On December 29, 1987, the district court again vacated petitioner's death sentence. The district court held that because the state trial court applied an incorrect legal standard—footnote 21 of *Witherspoon*—in making its finding of juror bias, that finding was not entitled to the presumption of correctness. (App. D at 19a, 21a) Relying on *Gray v. Mississippi*, 481 U.S. 648 (1987), the district court held, "[d]eference to state court fact finding is not appropriate where such fact finding was based on a misapplication of federal law." (App. D at 21a) The district court further determined that the correct standard, which had been articulated in *Adams* and reaffirmed in *Witt*, had neither been applied nor even inadvertently satisfied. (App. D at 21a) Finally, the district court held that the record, viewed as a whole, did not indicate juror bias under *Adams* and *Witt*. The district court observed, "[t]he earlier analysis by this court indicates that if the formulation from *Witt* had been properly incorporated into questions for this juror, she may well have answered that she was capable of following her instructions." (App. D at 21a)

The Eighth Circuit again reversed that decision on January 19, 1989, and denied petitioner's petition for rehearing and suggestion for rehearing en banc on March 13, 1989. The court agreed that *Witherspoon* footnote 21 was not the correct legal standard for determining juror bias. (App. A at 3a) It also agreed that the state trial court relied entirely on that discredited standard. (App. A at 2a, 4a) Nevertheless,

it *presumed as correct* the state trial court's finding of bias on the ground that the finding was fairly supported by the record. (App. A at 13a)

The first question presents the issue whether the Eighth Circuit erred in applying the presumption of correctness to findings predicated on the wrong legal standard. In applying the presumption of correctness in this case, the Eighth Circuit has decided a federal question in a way that directly conflicts with a host of applicable Supreme Court decisions in which, by express holding or by action, this Court held that the § 2254(d) presumption of correctness applied to state court findings *only* if the correct legal standard had been applied. *See, e.g., Gray v. Mississippi*, 481 U.S. at 661 n.10; *Cabana v. Bullock*, 474 U.S. 376 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963); *Rogers v. Richmond*, 365 U.S. 534, 548, 544-46 (1961). Its holding also directly conflicts with a number of decisions in the other circuits, which recognize and adhere to the same principle. *See, e.g., Bundy v. Dugger*, 816 F.2d 564, 566 (11th Cir.), *cert. denied*, 108 S. Ct. 198 (1987); *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986); *Clark v. Jago*, 676 F.2d 1099 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984); *Harris v. Oliver*, 645 F.2d 327 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981). However, the Eighth Circuit did not discuss any of these cases or analyze in any way the issue presented. It did not even discuss *Gray v. Mississippi*, upon which the district court relied in vacating petitioner's death sentence. Instead, it simply erected the presumption of correctness as a barrier around an historical finding

that it admitted was predicated on the wrong legal standard.

The second question presents an issue that was left open in this Court's decision in *Gray v. Mississippi*, 481 U.S. 648 (1987), and thus raises an important question of federal law which has not, but should be, decided. In *Gray*, a majority of this Court recognized that inadequate questioning regarding a prospective juror's views precludes a reviewing court from determining whether that prospective juror was erroneously removed for cause. *Id.* at 663. However, the Court did not decide whether the voir dire examination, to be adequate, must elicit direct testimony not only on whether a prospective juror is opposed to the death penalty, but also on whether those sentiments will prevent that prospective juror from carrying out his oath. It also did not decide whether evidence of a juror's professed ability or inability to carry out his oath is a material fact, and, if it is, whether the trial court's failure to establish evidence of that fact overcomes any presumption of correctness that might otherwise attach under 28 U.S.C. § 2254(d)(3).

The third question presents an issue concerning the retroactivity of *Wainwright v. Witt*. The Eighth Circuit apparently retroactively applied *Witt*'s holding that a presumption of correctness attaches to findings of juror bias, but it refused to apply *Witt*'s parallel holding that the state trial court must have employed a legal standard *other than* the discredited *Witherspoon* footnote 21 to reach its finding of bias. Thus, question three presents an important issue that has not been, but should be, decided by this Court. Additional guidance from this Court would assist the

lower courts in their interpretation of the dual holdings of *Witt*.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for certiorari to resolve the conflicts created by the Eighth Circuit's decision with decisions of this Court and other Courts of Appeals. Alternatively, this Court should summarily reverse the decision as directly in conflict with applicable Supreme Court precedent.

The reasoning and holding of the Eighth Circuit's decision that the presumption of correctness attaches to findings based entirely on a discredited legal standard is in conflict with the clear principles established by this Court in a series of decisions spanning several decades. In addition, the decision directly conflicts with decisions in the other circuits where those principles have been acknowledged. Given the inconsistency between the decision of the Eighth Circuit in this case and the decisions of this Court, petitioner respectfully submits that it is appropriate for this Court to reverse or vacate summarily under Rule 23.

This case also presents for the first time an opportunity for the Court to explain its combined holdings of *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Rogers v. Richmond*, 365 U.S. 534, 548 (1961), as recently affirmed in *Gray v. Mississippi*, 481 U.S. 648 (1987). It also poses the question, left open in *Gray*, concerning what facts constitute an adequate foundation for juror exclusion in death penalty cases. Finally, it presents squarely the issue of the retroactivity of *Witt*.

I. BY PRESUMING THE CORRECTNESS OF FACTS BASED ON AN ADMITTEDLY INCORRECT LEGAL STANDARD, THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO DECISIONS OF THIS COURT.

The decision of the Eighth Circuit to apply the presumption of correctness to findings of fact based entirely on an incorrect legal standard—like discredited footnote 21 of *Witherspoon v. Illinois*, 391 U.S. 510 (1967)—is in conflict with the Court's decisions in *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963), and *Rogers v. Richmond*, 365 U.S. 534, 548-49 (1961), and more recently in *Wainwright v. Witt*, 469 U.S. 412 (1985), *Cabana v. Bullock*, 474 U.S. 376 (1986), and *Gray v. Mississippi*, 481 U.S. 648 (1987), which establish that the correct standard of constitutional law must be applied before a state court's related findings of fact can be presumed correct.

In *Witt*, a death penalty case, the Court held that a state trial court's findings of juror bias made under the correct legal standard are factual findings entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Wainwright v. Witt*, 469 U.S. at 435. While acknowledging that the rigid standard of *Witherspoon* footnote 21 had been widely followed by state and federal courts for several years, *see id.* at 418, this Court held that the proper standard, as always intended by *Witherspoon*, was the standard articulated in *Adams v. Texas*, 448 U.S. 38 (1980), which is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45).

The Eighth Circuit's decision is at odds with *Witt*'s holdings in two critical respects. First, in *Witt*, this Court applied the statutory presumption of correctness only after determining that "[t]he trial court's finding of bias was made under the proper standard." *Wainwright v. Witt*, 469 U.S. at 435. Where in that case this Court noted that "there is every indication that the judge indeed applied the correct standard," *Wainwright v. Witt*, 469 U.S. at 431, here, precisely the opposite is true. The state has conceded, and the Eighth Circuit expressly found, that the state trial court based its finding of bias exclusively on the discredited *Witherspoon* footnote 21 test. The Eighth Circuit observed, "At the time of Hulsey's trial in 1975 the state court was acting under its interpretation of *Witherspoon*. *Adams v. Texas* and *Witt* had not been decided." *Hulsey v. Sargent*, 865 F.2d 954, 955 (8th Cir. 1989), App. A at 2a (citations omitted).[3] It also noted, "The state judge, supposedly relying on footnote 21 of *Witherspoon v. Illinois*, had found that the juror was unequivocally opposed to the death penalty and therefore could be excused by the State for cause." *Id.*, App. A at 2a (citation omitted). Therefore, the state trial court's finding of bias had not been made under the proper legal standard.[4]

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[3] Indeed, the state prosecutor in conducting the voir dire said to Mrs. Creamer, "[L]et me pose the question to you. . . . [W]e must ask it according to the Supreme Court in these words, so let me frame them to you, and your response should be a yes or no, okay?," whereupon he proceeded to pose the "automatically vote against" formulation of *Witherspoon* footnote 21. *Quoted in Hulsey v. Sargent*, 865 F.2d at 958, App. A at 10a.

[4] Even if it were the proper standard, the district court held twice, and the Eighth Circuit agreed, that *Witherspoon* footnote

Second, the Eighth Circuit applied the presumption of correctness not because the correct legal standard had been applied, as in *Witt*, but because it had not:

> We disagree with the district court's refusal to apply § 2254(d) and the presumption of correctness to the state court's finding. The state court applied the only standard then thought available.

Id. at 956, App. A at 4a. Thus, not only did the Eighth Circuit expressly rule out the possibility that any other standard—*i.e.*, *Adams*—had been applied, but it created an entirely new principle of habeas corpus jurisprudence: if the state court honestly believes it was acting in a manner consistent with the constitution, then its decisions are immune from serious judicial review, even if they are incorrect.

Apart from the implications of that principle, this Court has held that the reasoning is plainly wrong. In *Cabana v. Bullock*, 474 U.S. 376 (1986), the petitioner was sentenced to death as an accomplice to a murder some time before this Court had issued its decision in *Enmund v. Florida*, 458 U.S. 782 (1982), which clarified the legal standard under which

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21 had not been satisfied. The Eighth Circuit noted, "If the strict requirements of *Witherspoon* were deemed controlling we would have serious concerns about the state trial court's application of that standard. Mrs. Creamer's equivocal answers would seem to challenge the requirements espoused in *Witherspoon* that the juror's bias against the death penalty be 'unmistakably clear,' such that the juror would automatically vote against the death penalty." *Hulsey v. Sargent*, 856 F.2d at 955, App. A at 2a-3a, *see Hulsey v. Sargent*, slip op. (E.D. Ark. Dec. 29, 1987), App. D at 21a; *Hulsey v. Sargent*, slip op. (E.D. Ark. June 26, 1981), App. F at 40a.

a death sentence in such circumstances could be imposed. This Court examined the entire state record to see if any state court had made findings consistent with the new *Enmund* standard and found none. *See Cabana v. Bullock*, 474 U.S. at 387, 389-90. Thus, it found that the proper legal standard, *Enmund*, was not satisfied. *See id.* at 390. However, far from excusing the state's error, the fact that the correct standard had not yet been announced merely convinced this Court that an error indeed had occurred:

> We are very doubtful, however, that [the] assessments of the record [by the Mississippi Supreme Court] were sufficient in themselves to constitute [the *Enmund* finding]. *The Mississippi Supreme Court obviously was not addressing the specific requirements set forth in Enmund, for the case had not yet been decided.*

Id. at 389 (emphasis supplied). This Court therefore refused to apply the presumption of correctness and concluded that the petitioner was entitled to relief because the state had failed to make adequate findings on the basis of the correct standard of law. *See id.* at 390.

In *Gray v. Mississippi*, 481 U.S. 648 (1987), another death penalty case, this Court refused to apply the statutory presumption of correctness to a state trial court's finding of juror bias because the state court had excluded a juror for cause that it knew to be qualified. *See id.* at 661 n.10. This Court held:

> The State has devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact

> made by a trial court. Such deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law.

Id. (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)). Although this Court's decision in *Gray* was squarely presented to the Eighth Circuit on appeal and was heavily relied upon by the district court in its decision not to apply the presumption of correctness, the Eighth Circuit did not discuss, distinguish or even consider the case or its implications. In *Gray*, which reaffirmed that the improper exclusion of a qualified juror is never harmless error, *see Gray v. Mississippi*, 469 U.S. at 668, the Court was required to confront the issue of deference head on before it could determine whether an error of constitutional dimension in fact had occurred. Had it presumed as correct the state trial court's finding of juror bias, no harmless error analysis would have been required. Instead, this Court recognized that the state trial court had misapplied *Witherspoon* by excluding qualified jurors and not excluding other unqualified jurors—in an insupportable, if not irrational, interpretation of the law—and so it gave the findings of bias no deference.

This Court first addressed the issue of deference to findings based on an incorrect legal standard in *Rogers v. Richmond*, 365 U.S. 548 (1961). In that case, the state trial court determined the admissibility of petitioner's confessions by using a legal standard that took into account the probable truth or falsity of the confessions. *See id.* at 543. This Court held that that was not a permissible standard, *see id.* at 544, and that therefore "the conviction was vitiated by error of constitutional dimension." *Id.* at 545.

Mindful of the importance of fact-finding in trial courts "because this Court cannot sit as a trial tribunal to hear and assess the credibility of witnesses," *id.* at 546, this Court nevertheless held,

> With due regard to these considerations, it would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in which the trial judge or trial jury—whichever is charged by state law with the duty of finding [the pertinent facts]—passes upon that claim under an erroneous standard of constitutional law.

Id. (footnote omitted).

Soon after, in *Townsend v. Sain*, 372 U.S. 293 (1963), the Court wedded this concept more firmly to the presumption of correctness when it held that an accused was not afforded a "full and fair hearing" unless "the state finder had applied correct constitutional standards in disposing of the claim." *Townsend v. Sain*, 372 U.S. at 314. Although later codified as a mechanism by which to overcome the presumption of correctness, *see* 28 U.S.C. § 2254(d)(2), analytically the principle remains that a federal habeas court cannot credit a finding of fact tainted by an improper legal standard. The Court reasoned that a new evidentiary hearing on the issue or, at a minimum, a *de novo* review of the record was necessary because of the inherent uncertainty that "the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts." *Townsend v. Sain*, 372 U.S. at 314.

The Eighth Circuit justified its application of the presumption of correctness in this case on the ground that "fair support exists in the record" for the state court's bias determination. *See Hulsey v. Sargent*, 865 F.2d at 959, App. A at 13a. The Eighth Circuit thus misunderstood the import of *Witt* and the cases before and after it. In *Witt*, this Court indeed found that there was fair support in the voir dire to establish that the correct *Adams* standard had been met, but it did so only after expressly finding that the *Adams* standard had been applied. This Court set forth its three-step analytical process in its holding: "[t]he trial court's finding of bias was made under the proper standard, was subject to § 2254(d), and was fairly supported by the record." *Wainwright v. Witt*, 469 U.S. at 435. In contrast, the Eighth Circuit held that the trial court had not made its finding under the proper standard, but that the presumption of correctness applies anyway because the finding of bias under that standard is fairly supported by the record. *See Hulsey v. Sargent*, 865 F.2d at 956, 959, App. A at 4a, 13a.

The Eighth Circuit's reasoning fails not only because it is in direct conflict with *Witt*, but also because it is analytically unsound. First, the Eighth Circuit employed a concept ("fair support in the record") that is relevent only if the presumption of correctness attaches, *i.e.*, because the proper standard was used. The Court illustrated this in *Witt*. Having expressly found that the wrong standard was applied, which would be the first step in *Witt*, the Eighth Circuit thus is precluded from moving on to the second or third steps. Second, as this Court recognized implicitly in *Witt* and explicitly in *Rogers*, it makes

no sense to rely on findings that were tainted by the application of the wrong law. In *Rogers*, this Court stated:

> Nor, in a case where specific findings are made concerning the allegedly coercive circumstances, can those findings be fairly looked to for the "facts," *since findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for.*

Rogers v. Richmond, 365 U.S. at 547 (emphasis supplied). For the same reason, the Eighth Circuit cannot *presume* that the state trial court's finding of bias is correct merely by superimposing *Adams*, which the Eighth Circuit acknowledged the state court did not apply. As this Court said in *Rogers*,

> Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them.

Rogers v. Richmond, 365 U.S. at 547.

In this case, as the Eighth Circuit attempted to do precisely that. The Eighth Circuit said:

> It is true, as the district court reasoned, that the state prosecutor did not make specific inquiry concerning Mrs. Creamer's oath or her ability to follow, notwithstanding her convictions, the court's instructions. Yet there were sufficient questions propounded *that the trial judge*, who had the responsibility to serve as fact-finder and to pass on

> the credibility of the prospective jurors, had ample basis to determine that the juror's views would have prevented or substantially impaired her performance of her duties as a juror.

Hulsey v. Sargent, 865 F.2d at 959, App. A at 13a (emphasis supplied). This is the Eighth Circuit's error. After finding that the state trial court applied the wrong standard (because it was "the only standard then thought available," *id.* at 956, App. A at 4a), the court pretended that the state judge had applied the correct standard and then found "ample basis" to support the bias determination that supposedly resulted. It insisted on looking through the clouded lenses of the trial judge. Once it was determined that the state trial judge applied the wrong standard, concepts rooted in the presumption of correctness, such as whether "ample basis" exists to justify the judge's decision, are inappropriate. What the state court thought or, in this case, might have thought or done under the correct standard becomes irrelevant.[5]

Rather, it was incumbent upon the Eighth Circuit to scrutinize the voir dire *de novo* to see if *Adams* had been satisfied, *notwithstanding* the state trial court's irrelevant (and quite probably erroneous) finding that *Witherspoon* footnote 21 had been satisfied.

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[5] It is significant that the dissent in *Gray* offered an equivalent analysis. It argued that while the trial judge had erroneously excluded a prospective juror under the *Witherspoon* standard, it merely reached the right result for the wrong reason, thus making the error harmless. *See Gray v. Mississippi*, 481 U.S. at 672-73 (Scalia, J., dissenting). By refusing to find harmless error, the majority insisted that the state trial court excuse its jurors for the right reason.

Cf. Cabana v. Bullock, 474 U.S. at 390 (*de novo* review permitted to determine whether accomplice showed requisite intent under the proper standard). The district court undertook this analysis on two separate occasions, and each time made a factual determination that Juror Creamer was improperly excused under *Adams*. *See Hulsey v. Sargent*, slip op. (E.D. Ark. Dec. 29, 1987), App. D at 20a; *Hulsey v. Sargent*, slip op. (E.D. Ark. June 26, 1981), App. F at 39a. Both times, the district court concluded that the record showed no consideration of the *Adams* criteria and that, in any case, the *Adams-Witt* standard had not been met even on *de novo* review. *See* App. D at 21a; App. F at 38a-39a, 41a. Although the Eighth Circuit reversed the district court twice, it never disagreed with the district court's findings.

Thus, as applied by the Eighth Circuit, the statutory presumption of correctness acts to shield a decision that everyone who has looked at it substantively recognizes is wrong. It is wrong because it was based on the *Witherspoon* standard, it is wrong because the *Witherspoon* standard was not satisfied in any case, it is wrong because the *Adams* standard in concept was not applied by the state trial court, and it is wrong under a *de novo* review because evidence to satisfy the *Adams* standard was not developed in the record.[6]

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[6] It is sometimes assumed that because *Witherspoon* footnote 21 was a more "rigid" standard than the standard articulated in *Adams* and *Witt* that anyone properly excluded under *Witherspoon* necessarily would be properly excluded under *Adams* and *Witt*. Although not directly relevant here, because the district court held that *Witherspoon* footnote 21 was not satisfied, the assumption that if one satisfied *Witherspoon* one necessarily

The Eighth Circuit's decision is in direct conflict with applicable precedent of this Court, which the Eighth Circuit refused to address, even though this is a death penalty case. Therefore, summary reversal may be the appropriate remedy. Moreover, the position the Eighth Circuit took in applying the presumption of correctness to facts based on an incorrect legal standard in effect will shield virtually all state court decisions in habeas cases from federal review, however important the constitutional principle. Finally, the specific questions presented to the Eighth Circuit are likely to be presented in another court at another time, precisely because the *Witherspoon* formulation was so widely followed. This issue could arise in *any* death penalty trial conducted before *Adams*. The federal courts will benefit from timely guidance of this Court on the issue whether a presumption of correctness must attach to a finding of bias based entirely on *Witherspoon* footnote 21, or whether *Gray* compels the reviewing court to conduct a *de novo* examination of the record. Although application or nonapplication of the presumption of correctness is *not* result-determining in all cases, it is a critical issue that must be decided by the federal court in any death penalty habeas corpus case where juror bias is raised.

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satisfies *Adams* is also misplaced. That assumption posits a *Witherspoon* group of excludables as a smaller concentric circle entirely within the *Adams*/*Witt* ambit; in fact, the *Witherspoon* group's circle overlaps but does not entirely conjoin the *Adams* and *Witt* group, because *Witherspoon*, as customarily applied, does not focus on the second critical inquiry represented by *Adams* and *Witt*—whether the prospective juror, notwithstanding her views, would still be able to follow her oath and her instructions. That is the situation here. It was also the situation in *Gray*, but the Court did not have to resolve it as part of its harmless error inquiry.

Thus, petitioner submits that this Court's review of the issues presented will not only correct the error below, but also provide needed guidance to all federal courts in habeas corpus proceedings.

II. THE COURT IN *GRAY* DID NOT DECIDE WHETHER THE STATE TRIAL COURT DURING VOIR DIRE MUST ELICIT DIRECT TESTIMONY REGARDING WHETHER A PROSPECTIVE JUROR'S OPPOSITION TO THE DEATH PENALTY WILL PREVENT HER FROM CARRYING OUT HER OATH.

In *Adams* and *Witt*, this Court implemented a two-part inquiry to determine juror bias: first, the state trial court must ascertain the prospective juror's views; and second, the trial court must ascertain the effect of those views on the juror's ability to abide by her oath. This inquiry necessarily assumes that sufficient predicate questions are asked to develop all material facts regarding her views and *her perception* of their effect. Moreover, it assumes that the judge has had an opportunity to evaluate the credibility of her testimony on both issues, first to determine whether the juror's views are sincerely held,[7] and second to determine whether the juror's claim that she would subordinate her opposition to the death penalty to her duties as a juror is credible.

In *Gray v. Mississippi*, 481 U.S. 648 (1987), this Court recognized that the state trial court thus must "establish an adequate foundation for juror exclusion" in order to avoid constitutional error in the application of the proper legal standards. *Id.* at 662. That

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[7] For example, in *Gray*, it was apparent to the attorneys and the court that several jurors professing opposition to the death penalty did so only to avoid jury service. *See Gray v. Mississippi*, 481 U.S. at 652-53.

foundation must reflect both the prospective jurors' views on the death penalty and whether "they could set aside their scruples and serve as jurors." *Id.* at 663. A majority of this Court implied, but did not decide, that a prospective juror must be asked directly whether she could set aside her scruples and follow her oath. The dissent confronted the undecided question:

> [T]he plurality invents—but unfortunately does not justify—a new constitutional doctrine, not rooted in any constitutional provision and contradicted by our prior cases. The plurality suggests that potential jurors cannot properly be excluded for cause if "further questioning" *might* reveal that they did not really mean it when they would never vote to impose a death sentence. The Court has never before even hinted at such a requirement . . . .

Gray v. Mississippi, 481 U.S. at 674-75 (Scalia, J., dissenting)(emphasis in original). This case presents the opportunity to resolve the issue whether a voir dire examination that fails to ask directly whether the prospective juror could uphold her oath notwithstanding her opposition to the death penalty can adequately indicate bias.[8]

In this case, the prospective juror, Mary Creamer, answered six times that she *could* vote to impose the death penalty and indicated that she believed that the

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[8] This Court should also resolve the related issue of whether the presumption of correctness that ordinarily attaches to findings of juror bias is overcome because that "material fact" was not developed. *See* 28 U.S.C. § 2254(d)(3).

death penalty was appropriate for certain crimes and under certain sets of circumstances. *Quoted in Hulsey v. Sargent*, 865 F.2d at 957, App. A at 8a-9a. She stated flatly, "If I thought the person was guilty, I could vote for it. I know that." *Id.* However, in response to later questions, she expressed some discomfort about imposing the death penalty, and upon being asked a second time a question taken directly from footnote 21 of *Witherspoon*, she replied, "I believe I would [automatically vote against the imposition of the death penalty], yes, sir, because I don't want to take a life." *Id.* at 959, App. A at 11a. Upon examining this exchange, the district court concluded on two separate occasions that Juror Creamer had merely expressed her qualms about "tak[ing] the life of this defendant," as the prosecutor put it, and that she was naturally reluctant to vote to impose death. *See Hulsey v. Sargent*, slip op. (E.D. Ark. Dec. 29, 1987), App. D at 20a; *Hulsey v. Sargent*, slip op. (E.D. Ark. June 26, 1981), App. F at 38a. Her answers do not show an unwillingness to obey the court's instructions. Nevertheless, the Eighth Circuit inferred that her views would prevent or substantially impair the performance of her duties as a juror. *See Hulsey v. Sargent*, 865 F.2d at 959, App. A at 13a. Even assuming that the state court had understood and applied the *Adams* standard, the Eighth Circuit permitted the state trial court to decide *without ever asking her* that she would renounce her moral obligations as a juror in defense of her views on the death penalty.[9]

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[9] Indeed, the Eighth Circuit conceded that Juror Creamer was never asked whether she would abide by her oath and follow

Resolution of this—issue whether an explicit *Adams* foundation must be laid before a prospective juror may be excluded for cause—is critical to define for state and federal trial courts the required scope of voir dire. It will instruct courts and examining attorneys to be more scrupulous in compelling prospective jurors to confront and balance their competing moral values and to force them choose, if need be, between the opposition to the death penalty and their duties and oath as jurors. In addition, as this Court in *Gray* implied, it will resolve whether "inadequate questioning regarding the venire members' views in effect precludes an appellate court from determining whether the trial judge erred in refusing to remove them for cause." *Id.* at 663.

III. THE EIGHTH CIRCUIT FAILED TO APPLY *ADAMS* AND *WITT* RETROACTIVELY.

In its 1984 decision in *Wainwright v. Witt*, this Court addressed two separate questions: (1) it "examine[d] once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment," 469 U.S. at 414; and (2) it "consider[ed] standards for federal courts reviewing those procedures upon petition for writ of habeas corpus." *Id.* On the first question, the Court reaffirmed the legal standard for evaluating juror bias announced in *Adams v. Texas*, and expressly rejected the standard of *Witherspoon* footnote 21. *Id.* at 424. On the second question, the Court resolved confusion in the lower courts and held for the first time that, in questions of juror bias involving the issue of death qualification, the statutory presumption of correctness

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the court's instructions. *Hulsey v. Sargent*, 865 F.2d at 959, App. A at 13a.

contained in 28 U.S.C. § 2254(d) attaches to the state trial court's findings. *Id.* at 429. In so holding, this Court overruled a decision in the Court of Appeals that had held that findings of juror bias on the issue of death qualification presented a mixed question of law and fact entitled to no presumption of correctness. *Id.*; *see Darden v. Wainwright*, 725 F.2d 1526 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984). The Court did not expressly state whether either of its holdings amounted to a change in pre-existing law, and if so whether they have retroactive applicability.

At the time of this Court's decision in *Wainwright v. Witt*, Mr. Hulsey's death sentence had been set aside by the district court on the dual grounds that: (1) under the standard of *Witherspoon* footnote 21, Juror Creamer was improperly excused for cause; and (2) that under the standard announced in *Adams v. Texas*, Juror Creamer was improperly excused for cause. *See Hulsey v. Sargent*, slip op. (E.D. Ark. June 26, 1981), App. F at 38a-40a. On appeal before the Eighth Circuit, a panel of that court remanded the case for reconsideration in light of this Court's decision in *Wainwright v. Witt*. The district court, relying on this Court's decision in *Gray v. Mississippi*, 481 U.S. 648 (1987), again vacated the death penalty, on the ground that the state trial court had applied the wrong legal standard and that therefore the presumption of correctness under § 2254(d) did not attach to the state trial court's finding. *See Hulsey v. Sargent*, slip op. (E.D. Ark. Dec. 29, 1987), App. D at 21a. The Court then held that under the standard announced in *Adams*, and affirmed in *Witt*, Juror Creamer had indeed been improperly excused for

cause. *See id.*, App. D at 21a. The district court again vacated petitioner's death penalty.

In the second appeal of this issue to the Eighth Circuit, a different panel reversed the district court, holding that the district court improperly failed to apply a presumption of correctness to the state trial court's finding. Implicit in the Eighth Circuit's remand in the first appeal, and in its holding in the second appeal, is its belief that this Court's decision in *Wainwright v. Witt* is applicable to petitioner's case. However, any fair reading of the Eighth Circuit's opinion suggests that it only partially applied this Court's opinion in *Witt*. In a peculiar, unexplained portion of the court's opinion, the court, while conceding that the state trial court relied upon *Witherspoon* footnote 21 as the legal standard for evaluating juror bias, justified the application of that standard by the state trial court on the ground that it was the only standard then thought available. *See Hulsey v. Sargent*, 865 F.2d at 956, App. A at 4a. Necessarily implicit in that ambiguous statement by the Eighth Circuit is its view that this Court's decisions in *Adams* and again in *Witt*, should not be retroactively applied to the state trial court's analysis.

Resulting from the Eighth Circuit's holding is the confusing and insupportable view that the two holdings by this Court in *Wainwright v. Witt* have different application in this case. In short, the Eighth Circuit has let stand the state trial court's analysis under *Witherspoon* footnote 21 on the ground that it was the standard then existing while at the same time requiring the federal district court on habeas review to apply a presumption of correctness to that stand-

ard on the basis of this Court's decision in *Wainwright v. Witt.*

Because this Court in *Wainwright v. Witt* did not discuss the applicability of its dual holdings to then pending habeas court proceedings, the question presented raises an important issue of federal law which has not been, but which should be, settled by this Court. Because the Eighth Circuit, in the absence of any guidance on these issues, has adopted internally inconsistent views of the applicability of the dual holdings in *Wainwright v. Witt*, petitioner is faced with a death penalty that could not be sustained under any consistent application of those holdings.

IV. CONCLUSION

Petitioner is presently sentenced to die. This is true despite the fact that the United States District Court for the Eastern District of Arkansas has twice, over a period of eight years, held that his death sentence could not be sustained under any constitutional standard for evaluating juror bias ever announced by this Court. No court, including the United States Court of Appeals for the Eighth Circuit, has ever held that the district court's conclusion from the voir dire testimony under the relevant standard of law is incorrect. Rather, petitioner's death sentence is in place today because the Eighth Circuit has ordered that a presumption of correctness must attach to a finding of fact that everyone concedes was arrived at by the application—indeed misapplication—of *Witherspoon* footnote 21, which has since been discredited by this Court. The Eighth Circuit has so held, in direct conflict with, and without any discussion of, the con-

trolling opinion of this Court in *Gray v. Mississippi* and other applicable precedent of this Court.

In circumstances such as this, summary reversal of the Eighth Circuit's decision regarding the presumption of correctness is an appropriate remedy. However, this case also presents broad issues regarding the applicability of the presumption of correctness in pre-*Adams* death penalty cases when the state trial court relied entirely upon *Witherspoon* footnote 21. It also presents substantial issues of broad applicability in other areas of juror qualification in death penalty cases that, if resolved, will end confusion about the application of the *Adams* and *Witt* standard in those cases. Finally, this case presents questions regarding the retroactive applicability of decisions of this Court.

Accordingly, petitioner respectfully requests that his petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1148

Dewayne Hulsey,

Appellee,

v.

Willis Sargent, Superintendent,
Cummins Unit,
Arkansas Department of Correction,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: September 20, 1988
Filed: January 19, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

In *Hulsey v. Sargent*, 821 F.2d 469 (8th Cir. 1987), this court remanded for reconsideration the district court's earlier decision to vacate Hulsey's death sentence, in light of *Wainwright v. Witt*, 469 U.S. 412 (1985). On remand, the district court held that because the state trial court applied an incorrect legal standard, its factual finding that juror

Creamer was properly excused for cause was not fairly supported by the record. The district court therefore concluded that the presumption of correctness, under 28 U.S.C. § 2254(d), should not attach to the state court's findings. Hence, upon reconsideration, the district court again vacated Hulsey's death sentence. The State once again appeals. We reverse and remand with directions to dismiss Hulsey's petition for a writ of habeas corpus.

The district court found that the state trial court excluded the juror based upon the single affirmative response that she could not vote for the death penalty regardless of the evidence. The state judge, supposedly relying on footnote 21 of *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968), had found that the juror was unequivocally opposed to the death penalty and therefore could be excused by the State for cause. The district court held this was error since the state court did not ascertain, in light of other equivocal answers, whether despite her beliefs Creamer would have been able to follow her oath, i.e., whether she would *automatically* vote against the death penalty notwithstanding the law and her oath to follow the court's instructions. In other words, the district court held that the trial judge misapplied the *Witherspoon* test. On this basis the district court found that deference to a state court finding of fact was not appropriate where such a finding was based on a misapplication of federal law. *See Gray v. Mississippi*, 481 U.S. 648, ___, 107 S. Ct. 2045, 2053 n.10 (1987). Because the district court felt the state court applied an incorrect legal standard it concluded that the factual finding was not fairly supported by the record and did not apply the presumption of correctness thereto. *See* 28 U.S.C. § 2254(d)(8).

At the time of Hulsey's trial in 1975 the state court was acting under its interpretation of *Witherspoon*. *Adams v. Texas*, 448 U.S. 38 (1980), and *Witt* had not been decided. If the strict requirements of *Witherspoon* were deemed controlling we would have serious concerns about

the state trial court's application of that standard. Mrs. Creamer's equivocal answers would seem to challenge the requirements espoused in *Witherspoon* that the juror's bias against the death penalty be "unmistakably clear," such that the juror would automatically vote against the death penalty. This was, of course, the district court's understandable response in its first opinion. However, we noted in our remand, 821 F.2d at 471, that *Witt* had not been decided at the time of the district court's opinion. We remanded to the district court for further consideration in light of the clarifying principles of *Witt*.

In *Witt* the Supreme Court rejected footnote 21 of *Witherspoon* as dicta and reaffirmed the standard articulated in *Adams*. *Witt*, 469 U.S. at 420, 422. As the Court stated, this standard is whether the juror's view would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Id.* at 424. The Court thereby rejected "automatic" decisionmaking as well as the notion that bias be proved with unmistakable clarity. In this regard, the Court stated:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. * * * [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26 (footnote omitted).

We disagree with the district court's refusal to apply § 2254(d) and the presumption of correctness to the state court's finding. The state court applied the only standard then thought available. Whether the state court applied *Witherspoon* erroneously is immaterial to our discussion. In passing on the petition for a writ of habeas corpus the district court was required to appraise the record in light of the less stringent standard under *Witt*.

The district court found that the prosecutor did not inquire as to whether the prospective juror could perform her duties as a juror in accordance with her oath and the court's instructions. *Cf. Lockett v. Ohio*, 438 U.S. 586 (1978). We perceive the fundamental difference between *Witherspoon* and the *Adams-Witt* rule to be one of lessened degree as to the burden of proof.[1] In order to exclude a juror under *Witt* the State no longer must show that it is unmistakably clear that the juror's opposition to capital punishment would automatically cause exclusion. The *Witt* standard is one that requires the trial court to find that the juror's views would "prevent *or substantially impair* the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath."[2] *Witt*, 469 U.S. at 424 (emphasis added).

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[1] Justice Brennan writes that what the majority in *Witt* does is retrench from the "stringent standards of proof" required in *Witherspoon*. *Witt*, 469 U.S. at 452 (Brennan, J., dissenting).

[2] The Supreme Court noted that the language of the *Witherspoon* standard was outdated; it could not be "squared with the duties of present-day capital sentencing juries." *Witt*, 469 U.S. at 421. This is because the *Witherspoon* jury was vested with unlimited discretion in the choice of sentence. However, as the Court explained in *Witt*, such is no longer the case:

> After our decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), however, sentencing juries could no longer be invested with such discretion. As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the

After discussing this change of emphasis in the standard the Supreme Court then turned to stress the degree of deference that a federal habeas court must pay to a state trial judge's determination of bias. In discussing its decision in *Patton v. Yount*, 467 U.S. 1025 (1984), concerning the applicability of § 2254(d), the Court in *Witt* stated:

> Last Term, in *Patton, supra*, we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact subject to § 2254(d). We noted that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less." *Id.*, at 1038.
>
> * * *
>
> Once it is recognized that excluding prospective capital sentencing jurors because of their oppo-

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answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially.

Id. at 422 (footnote omitted).

> sition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the "factual issues" that are subject to § 2254(d).

Witt, 469 U.S. at 428-29 (footnotes omitted).

The state court voir dire of Mrs. Creamer was as follows:

> THE COURT: Do you know of any reason why, if selected to serve as a juror in this case, you could not try the case fairly and impartially, based solely on the evidence and the facts as you hear from the witness stand, and the instructions of the Court?
>
> MRS. CREAMER: No, sir, I know of no reasons why.
>
> * * *
>
> MR. RAFF: * * * Mrs. Creamer, this case is, as His Honor has already told you, is one involving capital felony murder. That's where we have charged the defendant with the taking of a human life during the perpetration or the commission of a robbery, and the penalty for that may be death, and the State, very candidly and very frankly, is going to ask this jury to return the death penalty in this case if they find this defendant guilty.
>
> Now, I know in this day and time many of us have discussed with other people, I have, I'm

sure you probably have, our feelings on the death penalty. Some people believe that we should have it, that it is a proper punishment. Other people do not. There's nothing wrong, in my judgment at least, with believing either way. It's a matter of personal belief. Do you have a belief in this regard?

MRS. CREAMER: No, I don't think so. I thought once I did, but I don't think so.

MR. RAFF: Do you mind telling me, when you said you thought once you did, how did you?

MRS. CREAMER: Well, if a person does something, I wouldn't want them to do it to me, if he's really guilty, I would just have to hear what is said, since I wouldn't know.

MR. RAFF: I'm not talking about his guilt or innocence.

MRS. CREAMER: You mean the death penalty?

MR. RAFF: Let's just assume that you think, from the evidence as you hear it, and the law, that he's guilty. You are convinced beyond a reasonable doubt this man is guilty. The second question that is going to be posed to you, if he is guilty, what are we going to do with him. You see?

MRS. CREAMER: Uh huh.

MR. RAFF: Well, some people just are against the death penalty, and just not going to vote for the death penalty. They just are not going to do it, don't believe in it. Are you like that? There's nothing wrong with being that way.

MRS. CREAMER: I don't know.

MR. RAFF: You don't know? You don't know whether you could vote for it or not?

MRS. CREAMER: If I thought the person was guilty, I could vote for it. I know that.

MR. RAFF: Well, I'm saying that you have already made a determination in your mind from the evidence—

MRS. CREAMER: If I thought if any person was guilty of a crime that deserved the death penalty, yes, I could vote for it.

MR. RAFF: What about this kind of a crime, because that's what he's charged with, that is committing a robbery, and while you are committing that robbery, killing somebody. Do you think that is the kind of crime that ought to carry the death penalty?

MRS. CREAMER: Yes, I do.

MR. RAFF: You do?

MRS. CREAMER: Yes, I do.

MR. RAFF: And assume you heard the evidence, and we all realize that no one sitting on a jury can be an eyewitness, so you have to make up your mind with respect to whether he is guilty or whether he's not from what you hear out there in that court room, and the evidence and the testimony as you hear it, and let's assume when you hear it, and you weigh that evidence to see what you believe and what you don't believe, and when you get through weighing it you come to the opinion that in your opinion beyond a reasonable doubt this man did that, he committed the robbery, and while he was doing it he killed somebody. Could you then, do you think that under that set of circumstances that that is the kind

of crime that the death penalty should be given for?

MRS. CREAMER: Yes, I do.

MR. RAFF: Could you vote for it yourself?

MRS. CREAMER: I guess. I believe I could. I was reading an article here the other day that I really could vote for, and I think I could. I don't know enough about this, I didn't read this. I don't know anything about it. I think I could.

MR. RAFF: Well, let me explain something to you, Mrs. Creamer, and I know I seem to be belaboring this, and I don't mean to be, and I wanted you to have some measure of indulgence with me here, but it is most important that we must determine now whether you can or not. Let me explain to you why. This defendant is on trial for his life. Anyone on trial for their life should have their rights protected all the way, and I think all of us in this room would agree to that.

MRS. CREAMER: Yes, sir.

MR. RAFF: And certainly he has a right, if he's not guilty of this crime, certainly not to be given the death penalty, but for our system to really work it is not just enough that he has his rights, the people must have some rights, too. In other words, if the person goes on that jury and they can't vote for the death penalty when it is the right thing to do, they just can't do it, then the people in the State of Arkansas are not having their rights, are they?

MRS. CREAMER: That's right.

MR. RAFF: So the only person that can tell us whether you are a good juror, and the kind of person that should sit in this case, only you

can tell us whether or not you could cast your vote and take the life of this defendant if he is guilty. Only you can tell us that, and you must tell us, otherwise there won't be a fair trial in that courtroom, isn't that true?

MRS. CREAMER: Yes. I couldn't do it.

MR. RAFF: You could not do it?

MRS. CREAMER: No.

MR. RAFF: Then let me pose the question to you.

THE COURT: Now, listen very carefully.

MR. RAFF: Let me pose the question to you, and it is basically the same thing I have just asked you, and I appreciate your frankness and your honesty with the Court. I know the Court does and all lawyers, too, but we must ask it according to the Supreme Court in these words, so let me frame them to you, and your response should be a yes or no, okay?

MRS. CREAMER: Yes.

MR. RAFF: I take it from your answer and what you have told me that you would automatically vote against the imposition of the death penalty without regard to any evidence that might develop at the trial of this case.

MRS. CREAMER: No. Say it again.

MR. RAFF: Would you automatically vote against the imposition of the death penalty without regard to any evidence that might develop at the trial of this case?

MRS. CREAMER: I know I'm confusing myself, but if the evidence were as such, I couldn't vote against it, but I just wouldn't want to vote for it. I couldn't vote against it.

MR. RAFF: Didn't you tell—

MRS. CREAMER: I wouldn't want to do it, but I couldn't vote—

MR. RAFF: Let me ask you this, didn't you tell me—

MRS. CREAMER: Yes, I did.

MR. RAFF: —that you could not vote for the death penalty?

MRS. CREAMER: I sure did, but then at the same time I could not say if any person was found guilty that I could set, if they were guilty, I just wouldn't want to be the one.

MR. RAFF: What we are talking about is, I said could you just not vote for the death penalty, and you said no, you could not. Your alternative here, you don't have to vote for the death penalty, even though he is guilty, you could vote for life imprisonment, you see. The jury has that choice.

MRS. CREAMER: Oh.

MR. RAFF: They have that choice. Now, what I'm trying to find out, even though you think he is guilty, would you automatically vote against the imposition of the death penalty without regard to any evidence that might develop in the trial of this case?

MRS. CREAMER: I believe I would, yes, sir, because I don't want to take a life.

MR. RAFF: Don't misunderstand me, there is nothing wrong with feeling that way, but we need to know, and only by people being honest and truthful with us, as you have been in your an-

swers, will we find out. I think you are to be commended.

THE COURT: Mrs. Creamer, I am going to excuse you for cause.[3]

Again, *Witt* controls our holding.

The law is stated in an opinion such as *Adams*; but the question in subsequent cases is whether a trial court finding that the standard was met is "fairly supported" by the "record . . . considered as a whole . . . ." The standard in this case is the easily understood one enunciated in *Adams*; whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S., at 45. Relevant *voir dire* questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will.

As we emphasized in *Marshall v. Lonberger*, 459 U.S., at 432, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. Here we think there is ample support for the trial court's findings that [the juror's] views would have prevented or substantially impaired the performance of her duties as a juror. On four separate occasions she affirmed that her beliefs would interfere with her sitting as a juror. One common meaning of "interfere" is to "create an obstacle." Respondent argues that in [this juror's] case, the obstacle was not insurmountable; but the trial court found to the contrary. * * *

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[3] Tr. of Voir Dire, Volume 3, pp. 365, 370-77.

> Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State.

Witt, 469 U.S. at 433-34. We hold that fair support exists in the record for the state court's determination that juror Creamer be excused for cause. It is true, as the district court reasoned, that the state prosecutor did not make specific inquiry concerning Mrs. Creamer's oath or her ability to follow, notwithstanding her convictions, the court's instructions. Yet there were sufficient questions propounded that the trial judge, who had the responsibility to serve as fact-finder and to pass on the credibility of the prospective jurors, had ample basis to determine that the juror's views would have prevented or substantially impaired her performance of her duties as a juror. It therefore follows that the state court's finding of bias as to this juror must be afforded the statutory presumption of correctness under § 2254(d). The district court did not do so and, accordingly, we reverse and remand this matter with directions to dismiss Hulsey's petition for a writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1148

Dewayne Hulsey,

Appellee,

v.

Willis Sargent,

Appellant.

On Appeal from the United States District Court for the Eastern District of Arkansas.

Filed: March 13, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ORDER

The petition for rehearing filed by appellee Dewayne Hulsey suggests that this Court's opinion was mistaken in directing that, on remand, the petition for habeas corpus be dismissed. Instead, the petition argues, we should have remanded for further proceedings.

This suggestion is well taken. Accordingly, the opinion of this Court, filed January 19, 1989, is amended by deleting therefrom the last sentence of text and substituting in lieu thereof the following:

> Accordingly, the judgment of the District Court is reversed. This cause is remanded to that court for further proceedings consistent with this opinion. We are advised that Hulsey has asserted other grounds of attack against his sentence and conviction. The District Court should now proceed to address these grounds.

In all other respects, the petition for rehearing by the panel is denied.

The motion of appellee for stay of mandate is denied.

The petition for rehearing en banc remains pending. An order will be issued in due course ruling on it. It is our view that the judgment of this Court will not become final until that order is entered.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1148-EA

Dewayne Hulsey,

Appellee,

vs.

Willis Sargent, etc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas

---

Appellee's petition for rehearing en banc has been considered by the Court and is hereby denied.

March 13, 1989

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

NO. PB-C-81-2

DEWAYNE HULSEY,

Petitioner,

vs.

WILLIS SARGENT, Superintendent of the Cummins Unit Penitentiary, Grady, Arkansas,

Respondent.

DEC 29 1987
ATTORNEY GENERAL
OF
ARKANSAS

ORDER

In 1975, the petitioner in this case, Dewayne Hulsey, was convicted of felony murder in an Arkansas state court. He was sentenced to death. His conviction and sentence were affirmed by the State Supreme Court, and he filed a petition for a writ of habeas corpus. This court vacated his death sentence on June 26, 1981, because it found that a juror had been improperly excused from his trial under *Adams v. Texas*, 448 U.S. 38 (1980) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968). It denied all of his other claims on April 30, 1985. Both parties appealed to the United States Court of Appeals for the 8th Circuit. That court remanded the *Witherspoon* issue for reconsideration in light of the Supreme court decision in *Wainwright v.*

Witt, 469 U.S. 412, 105 S.Ct. 844 (1985). This court entered an order on August 20, 1987 directing the parties to submit briefs on this issue. After carefully reviewing the material proffered by both parties, this court concludes that *Witt*, properly interpreted, does not change the result. Therefore, petitioner's death sentence must again be vacated.

The petitioner's challenge to the imposition of the death penalty arises from his allegation that one of the venire persons on his jury was improperly excused for cause. The law of death qualification had been in flux before the Supreme Court elaborated it in *Wainwright v. Witt*. The leading case prior to *Witt* was *Witherspoon v. Illinois*. In that case, the Court held that jurors could be excused from serving in a capital case if they made it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would "prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon*, 391 U.S. at 522 n.21 (emphasis in original). In *Adams v. Texas* and *Witt*, the court elaborated this standard. Under these cases, a juror can be excused if his opposition to the death penalty would "prevent or substantially impair his ability to decide the case in accordance with his instructions and his oath." *Witt*, 105 S.Ct. at 852.

In addition to clarifying the standard for juror excusability, the Court in *Witt* also held that the determination of whether a juror should be excused for cause due to his views on the death penalty was one of fact. Thus, a state trial court's finding on the issue is entitled to a presumption of correctness by federal courts conducting habeas corpus review. *Id* at 853. *See* 28 U.S.C. s. 2254(d). The respondent contends that the presumption of correctness is mandated in this case by both the remand and by the holding in *Witt*. Because the 8th Circuit remanded this

case for reconsideration rather than simply applying the presumption itself, the court disagrees with the respondent's assertion that the 8th Circuit's order requires it to apply the presumption.

The court, however, is persuaded that the holding in *Witt* requires application of the presumption of correctness. As the Court noted in *Witt*, the determination of whether a juror is biased depends largely on a finding of credibility and demeanor. *Witt*, 105 S.Ct at 854. In addition, the interest of courts in finality supports the application of the presumption. *O'Bryan v. Estelle*, 714 F.2d , 392 (5th Cir. 1983). Principles of comity also dictate deference in cases such as this. *Id.* Thus, this court must apply the presumption, unless one of the exceptions in s. 2254(d) (1-8) applies.

The court holds that the exception in 28 U.S.C. s. 2254(d) (8) applies in this case. That section states that the presumption will not apply if the state court's findings are not fairly supported by the record. In this case, the trial judge clearly applied an incorrect legal standard when he evaluated the qualifications of juror Creamer.

The Court in *Witt* noted that the presumption applied when the record did not make clear the legal standard relied on by a trial judge. *Witt*, 105 S.Ct at 856. In that case, however, the Court indicated that the record suggested that the correct legal standard had been applied. In the instant case, the record suggests the contrary.

Juror Creamer was asked whether she had any beliefs concerning the appropriateness of the death penalty; what her beliefs about it had been in the past; whether she was the type of person who "just [was] not going to" vote for the death penalty; and whether robbery in which a killing occurs is a proper crime for imposition of the death penalty. (T. Tr. at 371-377) Decisive, however, in the trial judge's mind were Juror Creamer's ambiguous answers to the prosecutor's question which he asked "according to

the Supreme Court." The prosecutor asked "[w]ould you automatically vote against the imposition of the death penalty without regard to any evidence that might develop at the trial of this case?" (T. Tr. at 377)

It is clear that the trial judge was attempting to apply *Witherspoon*'s footnote 21. Footnote 21 states that veniremen would be excluded for cause if "they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. . . ." *Witherspoon*, 391 U.S. at 522 n.21. The striking similarity between the *Witherspoon* formulation and the prosecutor's question, as well as the prosecutor's reference to the Supreme Court, indicate that both the judge and the prosecutor were relying on *Witherspoon*. That is no longer the correct legal standard.

An examination of this voir dire under the *Witt* rule shows that this juror was not properly excused under that rule. First, Juror Creamer stated that she did not think she had any beliefs regarding capital punishment. (T. Tr. at 371) Such an answer suggests that her opposition would not prevent her from following her oath. Second, she stated that she did not know if she was against the death penalty but she could vote for it if she thought a defendant was guilty. (T. Tr. at 371) Third, she stated she could not vote for the death penalty but followed that answer by saying "I couldn't vote against it, but I just wouldn't want to vote for it." (T. Tr. at 376) She further stated that "I just wouldn't want to be the one." (T. Tr. at 376) Finally, she stated she believed she would vote against the death penalty because she would not want to take a life. (T.Tr. at 377)

Although Juror Creamer demonstrated a reluctance to vote for the death penalty, her answers clearly suggest that, if placed on the jury, she would have been able to follow her oath. Neither the trial judge, not the prosecutor

asked Juror Creamer any questions concerning her ability to follow her oath or the law. On the basis of one of her answers to only one formulation of the *Witherspoon* question, the judge excused her for cause. The earlier analysis by this court indicates that if the formulation from *Witt* had been properly incorporated into questions for this juror, she may well have answered that she was capable of following her instructions.

The respondent contends that the fact that the state trial judge relied on the discredited *Witherspoon* footnote does not help the petitioner here. Respondent argues that at the time of petitioner's trial, *Witherspoon* was the law, and most courts were following it. The court, however, holds that the trial judge here misapplied the *Witherspoon* test. The *Witherspoon* case required that it be "unmistakably clear" that a juror would automatically vote against capital punishment. Here, that legal standard was clearly not satisfied. The *Witherspoon* question was put to this prospective juror twice, and only once did she answer that she would automatically vote against the death penalty. Her entire testimony was too ambiguous to allow for a finding that the "unmistakably clear" standard had been met.

Although issues of credibility and demeanor may be crucial in resolving some cases of possible juror bias, often the correct legal standard will make a critical difference as to the facts that a judge finds. *See Patton v. Yount*, 467 U.S. 1025, 1038, n.12 (1984). Deference to state court fact finding is not appropriate where such fact finding was based on a misapplication of federal law. *Gray v. Mississippi*, 107 S.Ct. 2045, 2053 n.10 (1987). This court concludes that because the trial judge applied an incorrect legal standard, its factual finding is not fairly supported by the record. Thus, the presumption of correctness does not apply in this case. The result reached is the same even when the case is reconsidered in the light of *Witt*.

IT IS THEREFORE ORDERED upon reconsideration that petitioner's death sentence be, and it is hereby again, vacated.

Dated this 21st day of December, 1987.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT COURT

This document entered on docket sheet in compliance with Rule [illegible] and/or 79(a). FILED on 12/28/87 by bw.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1796

Dewayne Hulsey,

Appellee,

v.

Willis Sargent, Superintendent, Cummins Unit, Arkansas Department of Correction,

Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

No. 85-1797

Dewayne Hulsey,

Appellant,

v.

Willis Sargent, Superintendent, Cummins Unit, Arkansas Department of Correction,

Appellee.

Submitted: March 9, 1987
Filed: June 12, 1987

Before, LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and HANSON,* District Judge.

LAY, Chief Judge.

In 1975 Dewayne Hulsey was convicted in the Arkansas state courts of felony murder and was sentenced to death. *Hulsey v. State*, 549 S.W.2d 73 (Ark. 1977) (en banc). The federal district court[1] in 1981 vacated Hulsey's sentence on the basis of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Adams v. Texas*, 448 U.S. 38 (1980), and in 1985 denied relief on all other claims. *Hulsey v. Sargent*, No. PB-C-81-2 (E.D. Ark. April 30, 1985).

In its order vacating Hulsey's death sentence, the federal district court made detailed findings of fact and conclusions of law concerning the voir dire of prospective juror Mary Creamer. The court found that Creamer should not have been stricken for cause from the jury. The trial court excused Creamer following a lengthy discussion between Creamer and the prosecutor about her views on the death penalty. In its analysis of Creamer's voir dire, the district court discussed what weight should be given to the state trial judge's assessment of prospective jurors' demeanor and credibility.[2] Writing in 1981, Judge Eisele concluded that after *Aiken v. Washington*, 403 U.S. 946

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* The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] The Honorable Garnett T. Eisele, United States District Court for the Eastern District of Arkansas, presiding.

[2] The Arkansas Supreme Court determined that the trial judge was justified in excusing Creamer for cause because he was in the best position to weigh her "somewhat contradictory assertions in order to determine, as he did, whether she was qualified under the rule of *Witherspoon*. *Hulsey v. State*, 595 S.W.2d 934, 936 (Ark. 1980).

(1971), federal courts need not afford substantial weight to state court findings in *Witherspoon* cases:

> [O]ne is left with the impression that the credibility findings of the trial court, his personal observations, are not to be weighed, at least very heavily, in the balance. In fact, it now appears that federal habeas courts are more or less relegated to a critical analysis of the cold record.

Since the time of the district court's original decision in 1981, the Supreme Court has decided *Wainwright v. Witt*, 469 U.S. 412 (1985). In that case, the Court made it clear that a federal reviewing court is required to accord a presumption of correctness under 28 U.S.C. § 2254(d) to the trial court's determination that a prospective capital sentencing juror should be excused for cause. 469 U.S. at 429; *see also Corcoran v. Wyrick*, 757 F.2d 207, 208-09 (8th Cir.), *cert. denied*, 106 S. Ct. 256 (1985). An assessment of juror bias in a capital case, as in any case, involves credibility findings. These are factual issues subject to § 2254(d). Because the district court relied on standards since altered by the Supreme Court, we deem it necessary to remand the sentencing phase of the case to the court for reconsideration in light of *Wainwright v. Witt*. In doing so, we pass no judgment on the district court's ultimate finding that the exclusion of Creamer was in violation of *Witherspoon* principles. Because of the ambiguities in the voir dire, we think it is imperative that the district court review the overall record, reconsider its findings in light of § 2254(d), and pass on the petitioner's claim first.

Hulsey also contends that prospective juror, John L. Clark, the first cousin of the county sheriff, should have been excused for cause, and the trial court's failure to do so deprived him of a fair trial.[3] A juror's partiality is a

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[3] The state argues that Hulsey is barred by *Wainwright v. Sykes*, 433 U.S. 72 (1977), because he did not object at the time of trial, nor

question of fact entitled to a presumption of correctness under § 2254(d). *Wainwright v. Witt*, 469 U.S. at 429. During voir dire, the trial court found that Clark was neither actually nor impliedly biased as defined by statute. Ark. Stat. Ann §§ 43-1919 to -1920 (Repl. 1977). The Arkansas Supreme Court agreed and specifically pointed out that the sheriff was not a party to the action and did not testify. *Hulsey v. State*, 549 S.W.2d at 75; *see* Ark. Stat. Ann. § 39-105 (Supp. 1985) (petit juror related to any party in a case may not serve). Clark also stated that he would give equal credence to testimony of witnesses for both sides. The district court found that Hulsey had failed to rebut the presumption of correctness afforded to these findings by the state courts.[4] This conclusion is not clearly erroneous.

Hulsey also maintains that the admission of certain inflammatory photographs violated due process. Admissibility of evidence is a matter of state law and usually does not form the basis for habeas corpus relief. *Ruff v. Wyrick*, 709 F.2d 1219, 1220 (8th Cir. 1983). The trial error must be so great that it infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial

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did he ask that Clark be excused for cause. Hulsey used one of his preemptory challenges to remove Clark. The Arkansas Supreme Court acknowledged the procedural default but reached the merits of the issue anyway and found no error. *Hulsey v. State*, 549 S.W.2d at 75. If the state court ignores a procedural default and addresses the merits of a claim, the defendant's failure to object at trial will not bar review of the federal habeas corpus claim. *See Worthan v. Wyrick*, 805 F.2d 303, 305 n.4 (8th Cir. 1986), *cert. denied sub nom*, 107 S. Ct. 1901 (1987).

[4] The state elected not to seek an immediate appeal in 1981 on the *Witherspoon* ruling. The district court retained jurisdiction over the other claims but did not decide them until 1985. *Wainwright* adhered to and applied the presumption of correctness under § 2254(d) to the state court's findings. In effect, the district court's rulings in 1981 and 1985 are inconsistent in that the first did not apply § 2254(d) and the second did. Presumably the intervening decision of *Wainwright* was the reason for the difference.

of due process. *Kuntzelman v. Black*, 774 F.2d 291, 292 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1474 (1986). An Arkansas trial judge has wide discretion in admitting photographs into evidence. *Shipman v. State*, 478 S.W.2d 421, 423 (Ark. 1972).

The two challenged photographs are pictures of the victim, showing cotton swabs protruding from facial and abdominal wounds. According to the testimony of Deputy Sheriff Irwin, the cotton swabs were necessary because the large amount of blood made it difficult to locate the bullet wounds. The victim had four gunshot wounds in his head and face and three in his body. Hulsey claims that these photographs were irrelevant to the state's case and were used only to inflame the jury. The trial court denied Hulsey's motion to exclude the pictures but required the state to explain to members of the jury before showing them the pictures why and how they were relevant. The court also gave a cautionary instruction that the sole purpose of the photographs was to show the entry and path of the bullets. The Arkansas Supreme Court held that under state law, the photos were admissible to show the savagery of the attack, as well as to corroborate Hulsey's confession. *Hulsey v. State*, 549 S.W.2d at 76.

Neither this court nor the district court may undertake to correct alleged trial errors in a federal habeas corpus review. Our task is to review the entire trial process to determine whether an alleged error of constitutional dimension fatally infected the trial. Admittedly, the photographs were gruesome, and the cotton swabs distorted an already grisly depiction of a dead human being. The trial court took care to limit the state's use of the pictures and to caution the jury as to their relevance. The pictures served a valid purpose in the state's case, and presumably the jury received them in that light. We agree with the district court that admission of these photos did not render Hulsey's trial so fundamentally unfair that it denied him due process of law.

Hulsey finally argues that his due process rights were violated by an in-court identification that was irreparably tainted by suggestive pretrial tactics. Tim Brooks testified at the suppression hearing that he arrived at the service station moments after Hulsey had killed his victim, the station attendant. Hulsey came out to Brooks' car and told Brooks that he was robbing the station and he had already killed one man. Brooks was within four feet of Hulsey and had a full view of his face. Hulsey pointed the rifle at Brooks and two children who were with him and told him to forget what he had seen. As Brooks was leaving, Hulsey walked up to his car, tapped on the window with the gun, and told Brooks that he had his license number.

The next day at the sheriff's office, Brooks picked Hulsey's picture out of approximately twenty photographs. Hulsey was not under arrest at the time. After Brooks had picked out Hulsey's picture, Brooks saw Hulsey in the hallway of the sheriff's office and recognized him immediately as the man at the service station. At the trial, Brooks positively identified Hulsey as the man he saw at the station.

The admissibility of identification evidence is determined using a two-step test. A court first must determine whether the confrontation between suspect and witness was impermissibly suggestive. If so, the court must ascertain under the totality of the circumstances whether the confrontation created a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).[5] The two-step test reflects the fact

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[5] The second inquiry goes to the reliability of the identification. *Manson v. Brathwaite*, 432 U.S. at 114. In *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), the Court set out the factors to be considered in determining the reliability of the identification. These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated

that not all impermissibly suggestive confrontations give rise to a substantial likelihood of irreparable misidentification. *Ruff v. Wyrick*, 709 F.2d at 1220.

This is not a case of a one-person showup, *Graham v. Solem*, 728 F.2d 1533, 1542 (8th Cir.), *cert. denied*, 469 U.S. 842 (1984), or a single photo display, *United States v. Henderson*, 719 F.2d 934, 937 (8th Cir. 1983), both instances where we found the pretrial procedures to be impermissibly suggestive. Even if the pretrial procedures used here were suggestive, our inquiry does not end. Brooks' identification is nonetheless admissible if there is no possibility of irreparable misidentification.

Brooks observed Hulsey from close range under bright lights at the service station. Hulsey stood next to Brooks' car on two occasions. Hulsey held the rifle as he spoke to Brooks, an act that surely commanded Brooks' undivided attention. Brooks was consistent and certain in his identification of Hulsey. We conclude that there was not a substantial likelihood of irreparable misidentification.[6]

The sentencing phase is remanded to the district court for reconsideration in light of *Wainwright v. Witt*. In all other respects, the opinion of the district court is affirmed.

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Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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by the witness at the confrontation, and the length of time between the crime and the confrontation.

[6] We agree with the district court's observation that even if Brooks' identification were deemed unreliable, Hulsey can show no prejudice since he admitted at trial that he shot the service station attendant.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-2

DEWAYNE HULSEY,

Petitioner,

v.

WILLIS SARGENT,
Superintendent of the Cummins Unit Penitentiary,
Grady, Arkansas,

Respondent.

No. PB-C-78-32

JAMES T. GRIGSBY,

Petitioner,

v.

JAMES MABRY,
Commissioner, Arkansas Department of Correction,

Respondent.

U.S. District Courtroom,
U.S. Post Office & Courthouse,
Little Rock, Arkansas,
Friday, June 26, 1981.

EXCERPTED FINDINGS

APPEARANCES:

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On behalf of respondents:

HONORABLE VICTRA FEWELL,
HONORABLE BILL MANN,
Assistant Attorney General,
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Little Rock, Arkansas 72201

PROCEEDINGS

* * *

THE COURT: Well, I appreciate the argument and I have read carefully the briefs and more particularly I have gone over this voir dire literally dozens of times and I have photocopied and cut and pasted and put together every question and answer of Mrs. Creamer that pertains to the issues before us. Then I went back and identified every different manner in which the Supreme Court has stated the Witherspoon principle that I could find, principally those in Witherspoon and Adams. Then I have attempted to relate the voir dire of Mrs. Creamer to those legal propositions.

I have read, as I say, her voir dire, and I find that Mrs. Creamer has stated under oath, after having the charge against Mr. Hulsey explained to her: one, that she knows of no reason why, if selected as a juror, she could not try the case fairly and impartially based solely upon the evidence and the instructions of the court;

Two, that she does not think that she has a belief in regard to the death penalty, although she thought at one time that she did;

Three, that if she thought that a person was guilty, she could vote for the death penalty. "I know that."

Four, that if she thought any person was guilty of a crime that deserved the death penalty, yes, she could vote for it.

Five, that she believes that killing somebody while committing a robbery is the kind of crime that ought to carry the death penalty;

Six, that if she were convinced beyond a reasonable doubt from weighing the evidence that the defendant committed the robbery and while doing so he killed a person, then under that set of circumstances the death penalty

should be given for that crime, and that she believes that she, herself, could vote for it;

Seven, that she has read an article about another case where she could really vote for the death penalty and that she thinks she could vote for the death penalty in this case although she doesn't know enough about it to say positively;

Eight, that if the evidence were such as to warrant it, she could not vote against the death penalty, although she would not want to vote for it. "I couldn't vote against it."

On the other hand, Mrs. Creamer has also stated under oath:

One, that she could not cast her vote to take the life of the defendant if he is guilty;

Two, that having a choice between death and life imprisonment, she believes she would automatically vote against the imposition of the death penalty without regard to any evidence that might develop in the trial, "because I do not want to take a life."

The voir dire questioning in Hulsey was different than the voir dire questioning in Grigsby. Essentially in Grigsby the jurors were asked if there were any set of circumstances under which the juror would be willing to consider the death penalty. It appears clear that if that question had been put to Mrs. Creamer, she would say, yes, there are circumstances under which she would consider and could vote for the death penalty.

It is clear that Mrs. Creamer is not adamantly opposed to the death penalty; that she believes that penalty to be appropriate in certain cases, including a case where a person is killed during the commission of a robbery. She also believes that there are certain sets of circumstances in certain cases where she could not vote against the death

penalty. So we can conclude that Mrs. Creamer is not a person who would "automatically vote against" the death penalty.

Now the State might argue that Mrs. Creamer would automatically vote against the death penalty if there were some other penalty option available to her. The State argues that as soon as the prosecutor explained to Mrs. Creamer that, if the defendant were found to be guilty, the jurors would have the option of imposing the death penalty or life imprisonment, that Mrs. Creamer then stated that she believed she would automatically vote against the imposition of the death penalty. But this argument gives too much weight to one question and one answer, and does not analyze that question and answer in the light of what Mrs. Creamer had previously said.

First, the turning point in Mrs. Creamer's testimony did not come, as some suggest, after the prosecutor had explained the death versus life imprisonment options; rather, it came earlier when the prosecutor asked one of his questions in very subjective terms, to wit: ". . . only you can tell us whether or not you could cast your vote and take the life of this defendant if he is guilty." This question brought forth the answer, "Yes. I couldn't do it." But immediately after saying this, Mrs. Creamer answered the key Witherspoon question, "Would you automatically vote against the imposition of the death penalty without regard to any evidence that might develop at the trial of the case?" by stating, "if the evidence were such"—and I interpret that to mean adequate—she could not vote against the death penalty even though she would not want to vote for it. She "just wouldn't want to be the one."

Thereupon the prosecutor started arguing with Mrs. Creamer concerning her prior response. Then followed the prosecutor's explanation of the alternative of life imprisonment. Then repeating his Witherspoon question brought

forth Mrs. Creamer's answer, "I believe I would, yes, sir, because I don't want to take a life."

There are various ways to analyze Mrs. Creamer's last answer. One would be that she was just worn out by the questions and wanted to get it over with by going along with the prosecutor. Another would be, as the State contends, that she was unequivocally stating that she would automatically vote against the death penalty if she had the alternative of voting for life imprisonment. There are two things wrong with this analysis. First, her answer is not unequivocal. It is stated in terms of "believing." Second, despite Mrs. Creamer's statement of understanding, to wit, "Oh," after an explanation of the sentence alternatives had been explained to her, a reading of the entire voir dire would suggest that she clearly understood very early on in the voir dire that death would not be the only alternative if the defendant were found guilty.

The trial court itself explained the capital felony charge against Mr. Hulsey in that he was being charged with having unlawfully killed John Easley after premeditation with malice aforethought while engaged in the perpetration of a robbery. The prosecutor then repeated the charge and then he explained, ". . . and the penalty for that may be death, and the State is going to ask this jury to return the death penalty if they find this defendant guilty."

The prosecutor used the words "may" and "ask." It is important to also note that the prosecutor asked Mrs. Creamer to assume that she had been convinced beyond a reasonable doubt of Mr. Hulsey's guilt. He then stated, "The 'second question' that is going to be posed to you, if he is guilty, what are we going to do with him. You see?" Mrs. Creamer responded that she understood. It can therefore not be convincingly argued that Mrs. Creamer was under the misapprehension that the jury had only two alternatives: one to find him not guilty, and the other to find him guilty, thereby subjecting him to the death pen-

alty. The prosecutor made it clear that, after the guilt of the defendant had been established by the jury, they would then be asked the second question of "what are we going to do with him?" Implicit in this question is that there will be alternative penalties which the jury could consider.

Trying to relate this factual background to the law, one is tempted simply to state that this is a close question and we should therefore uphold the trial judge's "for cause" determination because he had the opportunity to observe the demeanor and manner of Mrs. Creamer as she answered the various questions. And any trial judge knows that the manner and timing of Mrs. Creamer's answers could make a difference in the interpretation of those answers. The Arkansas Supreme Court relied heavily upon this point when it stated: "The trial judge had the opportunity to observe the juror as she answered questions on voir dire. The judge was in a position to weigh her somewhat contradictory assertions in order to determine, as he did, whether she was qualified under the rule of Witherspoon. We find that the trial judge was justified in excusing the juror." 268 Ark. 312, 315. But the decisions of the United States Supreme Court suggest great caution in accepting this approach. See, for example, Aiken v. Washington, 403 U.S. 946, which summarily overruled Washington v. Aiken, 75 Washington 2d 421 on the basis of Witherspoon.

Reading the state case and the reversal on Witherspoon, one is left with the impression that the credibility findings of the trial court, his personal observations are not to be weighed, at least very heavily, in the balance. In fact, it now appears that federal habeas courts are more or less relegated to a critical analysis of the cold record. Assuming then that this is the proper approach, it is important first to set out the various ways in which the Witherspoon principle has been stated by the United States Supreme Court and then relate Mrs. Creamer's statements to those principles.

We start from the proposition that the State has a legitimate interest in obtaining jurors who can follow the court's instructions and obey their oaths. Then we are instructed that a State may not constitutionally execute a death sentence imposed by a jury culled of all those having conscientious scruples against or otherwise being opposed to capital punishment, because "... a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him and can thus obey the oath he takes as a juror." Language from both Witherspoon and Adams.

On the other hand, the death sentence may be imposed by a jury from which persons have been excluded for cause "who make unmistakably clear, one, that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed; or, two, that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Now this second proposition was not raised or discussed with Mrs. Creamer.

The first, that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed, with respect to that proposition, Mrs. Creamer did not make it unmistakably clear that she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed.

In Adams versus Texas it is stated, "A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law in assessing punishment." It is clear that Mrs. Creamer is not "wholly unable" even to consider imposing the death penalty regardless of the facts. On the contrary, she has indicated that in certain circumstances she could not vote against the death penalty.

In Boulden versus Holman it is pointed out that even a person who has a "fixed opinion against" or does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by the law, "to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." Mrs. Creamer not only stated under oath that she knew of no reason why she could not fairly and impartially try the case based solely upon the evidence and the instructions of the court, but it also appears that she did not have a "fixed opinion against" capital punishment. Furthermore, she "believed in" capital punishment in certain cases and felt that it was an appropriate penalty for the charge that was pending against Mr. Hulsey.

Were Mrs. Creamer's views about capital punishment such as would "prevent or substantially impair" the performance of her duties in accordance with the instructions and her oath as would be required by the Supreme Court in Adams? It is clear that she had certain qualms about capital punishment, and she did not "want to" impose that penalty, but it is also clear that in certain circumstances she could not vote against that penalty.

Can we say that Mrs. Creamer is not willing to accept that in certain circumstances death is an acceptable penalty? The answer is obviously "no" since she has clearly testified that in certain circumstances death is an acceptable penalty.

Can we state that Mrs. Creamer would not be willing to make any required factual determination in the Hulsey case "without conscious distortion or bias." The Court notes this language from Adams, and particularly the term "conscious." The Supreme Court has recognized that one's views on capital punishment might influence the manner in which he performs his role without exceeding the appropriate discretion permitted by law. The court pointed out, "This process is not an exact science, and the jurors

unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths."

We are ultimately brought back to the proposition that Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation upon the State's power to exclude. If jurors are barred because of their views about capital punishment on "any broader basis" than inability to follow the law and abide by their oaths, the death sentence cannot be carried out. That's stated in Witherspoon and Adams. Can we say on the basis of this record that Mrs. Creamer, because of her views about capital punishment, would be unable to follow the law and abide by her oath as a juror? The Court, reluctantly and with some hesitation, finds and concludes that the voir dire record concerning Mrs. Creamer will not permit an affirmative answer to that question.

Reluctantly because the state courts have given this issue careful and serious consideration, both at the trial and at the appellate level, and with hesitation because the issue is, in any event, a close one. Still, this Court concludes that no other result is permissible in the light of the pronouncements of the United States Supreme Court on this most sensitive issue. The Supreme Court has gone out of its way to indicate that a juror with scruples against the death penalty should not be excluded only because his views might have some effect upon the performance of his duties. It almost seems to be stating that unless those scruples were such that a prospective juror would consciously violate his oath or fail to follow the court's instructions in order to avoid imposing a death penalty, that such person should not be excluded. See Adams where it is said, for instance:

"Nor in our view would the Constitution permit the exclusion of jurors if they aver that they will honestly find the facts if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the pros-

pects of the death penalty may affect what their honest judgment of the fact will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, . . ."

The Arkansas Supreme Court's analysis of Mrs. Creamer's "somewhat contradictory assertions"—Hulsey versus Arkansas, 268 Ark. 312, 314—is reasonable given its emphasis upon the trial court's perceptions. But an examination of the entire record of Mrs. Creamer's voir dire suggests that the contrary analysis is at least as reasonable. Certainly the record does not make it unmistakably clear that Mrs. Creamer's attitudes towards the death penalty would make her automatically vote against that penalty regardless of the evidence. Nor does the record make it "unmistakably clear" that Mrs. Creamer could not have served as an honest juror obeying instructions, following the law and abiding by her oath. Just reflect on her voir dire. For pages of questions the prosecutor got nowhere but nevertheless doggedly pursued the subject even when Mrs. Creamer's answers would seem to have removed any basis for a proper Witherspoon issue. What would have been the trial court's ruling on the Witherspoon challenge had it been called upon to make that ruling at any time prior to the last question and answer?

For instance—was it Judge Hargraves? Was he the trial judge?

MR. LIEBMAN: Yes, Your Honor.

THE COURT: After Judge Hargraves asked her if she knew of any reason why she could not fairly and impartially try the issues based solely on the evidence and the court's instructions as to the law? Of course, there could have been no strike at that time for cause.

Or, two, after Mrs. Creamer indicated she believed the death penalty was appropriate for certain crimes and un-

der certain sets of circumstances. Certainly no strike for cause at that time.

Or, three, even after she said she couldn't vote to take the life of the defendant, but promptly went on to say when asked the precise Witherspoon question that "if the evidence were" adequate, she could not vote against the death penalty, although she would not want to vote for it. Then still clearly no strike for cause.

But when asked the Witherspoon question once more, she replied, "I believe I would, yes, sir, because I don't want to take a life." Now, suddenly [sic], is there cause? After getting good Witherspoon answers to many questions, what is the magic of one bad answer taken in context? How one asks a question is very important. One gets the feeling that the manner in which the prosecutor asked the question that brought on the first clear-cut statement may have had some effect upon that answer. Here is the way he asked the question:

"MR. RAFF: So the only person that can tell us whether you are a good juror and the kind of person that should sit in this case, only you can tell us whether or not you could cast your vote and take the life of this defendant if he is guilty. Isn't that true?" "Yes. I couldn't do it."

What if she had been asked: "Would you disobey the Court's instructions and violate your oath by not imposing the death penalty if you were convinced that the law and the evidence required that sentence?" My own judgment from reading the record is that she would have answered that in the negative; that she would have stated that she could follow the law and she would not disobey her oath.

I think we have in Mrs. Creamer a person who appears to be extremely conscientious, attempting to reveal her feelings, having trouble articulating them, ending up with a record that is not too unusual when confronted in the environment of a voir dire with lawyers in the courtroom.

So the ambiguities and the record that we have is, I think, understandable.

It follows from the Court's analysis that it really has no alternative but to find that the death penalty may not be carried out in this case because of the violation of Witherspoon.

* * *

CERTIFICATE

I, Carolyn S. Fant, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct excerpt of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Carolyn S. Fant
Carolyn S. Fant, Official Reporter

APPENDIX G

§ 2254.- State custody; remedies in Federal courts

* * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.